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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1[illegible]

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JERRY LAIN BEHELER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1666

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
JERRY LAIN BEHELER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Jerry Lain Beheler, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished opinion of the Fifth District Court of Appeal in and for the State of California.

QUESTION PRESENTED

Petitioner asks this Court to decide whether "Miranda warnings [are] required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, voluntarily comes to the police station, and is allowed to leave without hindrance after a brief taped interview."

In light of the salient facts of this case, the question would be more fairly posed as follows:

Are Miranda warnings required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, is not aware of nor informed of his status as a suspect, voluntarily comes to the police station, and is allowed to leave without hindrance after a taped interrogation?

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STATEMENT OF THE CASE

A. Proceedings in the State Court

On July 23, 1980, Mr. Beheler was convicted as an aider and abettor of first degree murder (felony-murder theory) for the homicide perpetrated by Daniel Wilbanks. (CT 141.) On March 31, 1981, Mr. Wilbanks was convicted of voluntary manslaughter for the killing he perpetrated. Mr. Wilbanks received a sentence of eight (8) years in prison. (WCT 831-835.)[1/] Mr. Beheler was sentenced to serve a term of life in prison without possibility of parole.

Petitioner is incorrect in its statement of the case. Mr. Beheler was found to have been vicariously armed with the firearm used by Mr. Wilbanks. (See Petition, pp. 4-5; CT 141.) Mr. Wilbanks was found to have personally and intentionally used the weapon in the commission of the homicide. (WCT 834.)

B. Statement of the Facts[2/]

Mr. Beheler had been honorably discharged for his service to his country. And he had been continuously providing for his wife of ten years and his three daughters. He had a keen interest in meeting and getting to know his half-brother, Mr. Wilbanks. As a result, Mr. Beheler invited Mr. Wilbanks to stay with his family in Bakersfield for a few weeks until Wilbanks found work in the surrounding oil fields.

It was during this period of time that they spent a day together drinking beer and malt liquor while playing dominoes at home. By the end of the day, they were both drunk.

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1. The transcript of Mr. Wilbanks' trial has been made a part of Mr. Beheler's record on appeal. WCT refers to the Wilbanks' Clerk's Transcript.

2. Please see the complete and documented rendition of facts in respondent's Opposition to Application for Stay of Enforcement of the Judgment and the accompanying attachments (hereinafter Opposition to Stay) at pp. 4-10, incorporated by reference herein.

During repeated trips to the liquor store, they had been approached by the victim, Peggy Dean, who peddled drugs in the liquor store parking lot. It was 11:15 p.m. when Mr. Beheler and a mutual acquaintance, Rocky Howard, drove to Mr. Chavez' house. Chavez joined the group. As the immunized chief prosecution witness, Mr. Chavez explained just how drunk Mr. Beheler was. Everyone agreed he should not be permitted to attempt to drive or actively participate in stealing the purported hashish. Indeed, he was in the back seat of the car, nearly passed out, when the crime occurred.

At midnight, after drawing the gun (which belonged to Rocky Howard's father), and demanding the bindles, Mr. Wilbanks pulled the trigger, instantly killing the drug seller.

Wilbanks drove back to the Beheler house sobbing. Mr. Beheler heard the others explain to his wife what had happened. He told his half-brother he could stay there no more. Chavez and Howard hid the gun and advised everyone not to assist the police.

Mr. and Mrs. Beheler immediately called the police. (There was no delay as petitioner suggests at page 6 of the petition.) Officers arrived at the scene at midnight, and by 12:30 a.m. Deputy Lantz had been ordered to go to the Beheler house in response to his call. (ART 3.)

When the officer arrived, he found Mr. Beheler "was very upset. He was behaving as though he were almost grief stricken." (ART 8.) He was crying. In addition, "[h]e had the odor of alcoholic beverage on his breath and around him. Sometimes his speech would be moderately or mildly slurred." (ART 8.) Mr. Beheler repeatedly exhibited concern for his half-brother (AH 14), apparently unaware of potential vicarious liability for the crime. After the officers obtained consent to search forms signed by Mr. Beheler, they searched his house,

his yard and his car.

By this time they possessed probable cause to arrest Mr. Beheler. (In its independent review of the facts, the Court of Appeal so found. See also Opposition to Stay, p. 12.) However, the evidence is uncontradicted that no officer ever informed him that he was criminally liable and/or that he had a right not to incriminate himself. Instead, the state continued to investigate while affirmatively reassuring Mr. Beheler that he was not in danger of incriminating himself by telling him that he was not under arrest and that they wanted him to answer some questions in depth at the sheriff's department. Officer Lantz "asked if he had any objection to that, and explained he was not under arrest but that it would merely facilitate a speedy conclusion to the interviews." (ART 6.)

Prior to the day Mr. Wilbanks killed Peggy Dean, Mr. Beheler had never been involved in, investigated on, or arrested for a crime. (He had been summarily cited for driving under the influence only.) He had no background in police investigative procedures. And, as the state conceded in argument to the jury, he had no understanding that he could be held responsible for the killing committed by Mr. Wilbanks, or that the killing would be deemed first degree murder under the felony-murder rule.

Mr. Beheler indicated he would go with the officers in their car to the station. Officer Lantz said: "He was willing, yes. It was his desire to bring the investigation to a conclusion as soon as possible." (ART 6.)

It was at this point that the officers drove Mr. Beheler to the sheriff's station in a patrol car and tape recorded their interrogation of him regarding a crime they assumed was murder. Officer Lantz had arrived at the Beheler house at 1:00 a.m. The questioning continued until 2:23 a.m. when Detective Del Ray turned on the tape-recorder for another

forty minutes of interrogation at the station. Once the officers had a complete, albeit unknowing, confession, they allowed Mr. Beheler to leave by his only means of transportation: their sheriff's patrol car. It was then nearly three o'clock in the morning.

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ARGUMENT

THIS IS THE WRONG CASE IN WHICH TO DECIDE THE QUESTION PRESENTED

Petitioner asks this Court to decide whether "Miranda warnings [are] required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, voluntarily comes to the police station, and is allowed to leave without hindrance after a brief taped interview." By this question the State of California asks the Court to decide a much broader proposition than that presented by the very narrow facts of this case.

Mr. Beheler, as a passive aider and abettor, never understood that he was, himself, a suspect. He did not commit the killing and he did not intend the killing. Contrary to the facts of decisional precedent,[3/] law enforcement never informed Mr. Beheler of his own vicarious liability. As a result, the voluntary nature of his acquiesence to an officer's request that he accompany him to the station for questioning is compromised since it is axiomatic that for a confession to be voluntary, it must be knowledgeable.

Of course, the facts of this case are even narrower than the situation in which officers request an individual to come to the station to answer questions without informing the person of his suspect status. Where the uninformed interrogatee is the direct perpetrator of the crime, he appreciates his suspect status on some level even without being told. Lack of this knowledge became critical to Mr. Beheler, a passive aider and abettor, when officers expressly informed him that he was not under arrest and that the stationhouse interrogation was for the purpose of rapidly concluding the investigation. Thus, unknowingly, Mr. Beheler became a suspect who believed

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3. Petitioner points to Oregon v. Mathiason (1977) 429 U.S. 492, 50 L.Ed.2d 714, as decisional precedent. (Petition, pp. 15, 16, 19, 20, 21, 28, 32, 33.)

that his importance to the officers was as a witness or an ally.

The facts herein also involve a person who has never been arrested or even investigated for a crime (contrary to decisional precedent). Those that would fall within this category of interrogatees comprise a very small class indeed. This is not the common factual denominator upon which to decide petitioner's question which addresses only the probable cause qua custody issue.

Moreover, it could be argued (as respondent does) that the quantum of evidence, i.e. "focus" element, has already been decided to be of limited relevance in determining the legal trigger invoking the Miranda admonition. "[N]or is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." (Oregon v. Mathiason, supra, 429 U.S. at 495.)

If the importance of the probable cause threshold issue survives Oregon v. Mathiason, such that the issue must be resolved for all the states, surely that question will appear again in a case which is not distorted by the very limiting and unique facts presented here.

For this and the reasons that follow, the writ should be denied.

A. The Facts Of This Case Disqualify It From Being Simply A Mathiason Offspring Because Mr. Beheler Was Not Informed Of His "Target Status" Under United States v. Washington, Infra

In Mathiason, the defendant arrived at the police station (just two blocks from his home) on his own. "'The officer met defendant in the hallway [at about 5:00 p.m.], shook hands and took him into an office. The defendant was told he was not under arrest. The door was closed. The two

sat across a desk. The police radio in another room could be heard. The officer told defendant he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised that the police believed defendant was involved in the burglary and [falsely stated that] defendant's fingerprints were found at the scene. The defendant sat for a few minutes and then said he had taken the property.'" (Oregon v. Mathiason, supra, 429 U.S. at 493.)

Thus, when Mathiason decided to confess, he had deliberately weighed the fact that the police suspected him of the crime within the less-than-compelling atmosphere created by knowing he was not under arrest. He could reasonably presume the police did not believe they had sufficient evidence to arrest him, and he chose to fill in the gaps. He was fully aware then that he was a suspect and yet he told his story to the police. This element of knowledge critically distinguishes the Mathiason holding from the facts of this case.

Here, the officers did not inform Mr. Beheler of his potential vicarious liability, nor that he was a suspect in the investigation. On the contrary, he was led to believe that he was assisting the officers as a witness to a crime committed by his half-brother. Thus, his confession was unintelligent in that he was unaware of his potential liability or that the officers instead were gathering evidence to use against him. Since such knowledge is a necessary legal ingredient to a "voluntary" confession which results from police questioning, respondent challenges petitioner's conclusion that he "voluntarily" came to the police station, or that he "voluntarily" incriminated himself by responding

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to the interrogation.[4] Mr. Beheler did not do this "voluntarily" because he was unaware of his own potential criminal liability as well as his "target status." (Cf. United States v. Washington (1977) 431 U.S. 181, 52 L.Ed.2d 238, where a "targeted" witness was given full written Miranda warnings and signed a written waiver.)

Unlike Mathiason, Mr. Beheler had no prior experience with the criminal justice system from which to guess at the officers' real investigative goal. In addition, the police testified that he was grief-stricken and crying throughout this period, and that he appeared to be under the influence of alcohol.[5]

Moreover, he was not as free to leave as Mathiason. Mathiason arrived at the station on his own at 5:00 p.m., and his home was but two blocks away. In this case the officers drove Mr. Beheler to the station in a patrol car at two o'clock in the morning, thus rendering him incommunicado once inside the police station. The record does not indicate the distance Mr. Beheler would have had to walk had he chosen to go home without the officers' consent. Nor does the record indicate whether the officers would have permitted him to go if he had withdrawn from the recorded interrogation. Certainly, as petitioner concedes, the officers had probable cause to place him under formal arrest at that time to prevent his departure, unlike Mathiason.

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4. Similarly, Mr. Beheler's statement that he voluntarily came to the station and answered the questions was uninformed as to the legal requisites for voluntariness, and is therefore not relevant.

5. Mr. Beheler reasserts that the decision of the Court of Appeal rests in substantial measure on the prosecution's failure to prove beyond a reasonable doubt that the respondent's acquiescence to transportation for stationhouse interrogation, like his incriminating responses thereto, was involuntary under California's independent state grounds. Respondent's argument in the Opposition to Stay, at pp. 11-17, is incorporated by reference in its entirety herein.

Being told that he was not under arrest is not a common factor in the analysis of the Mathiason and Beheler cases; rather, it graphically illustrates their differences in the critical area of compulsion. To say "You're not under arrest" to one who knows he is a suspect removes the compelling nature of the stationhouse inquiry. To some extent it reassures the known suspect he is free to go rather than answer questions which he can assume are aimed at incriminating him. However, to say "You're not under arrest" to one who is unaware of his own potential criminal liability (not being the perpetrator of the act, nor intending it), and who is unaware of his suspect status in the eyes of the police, increases the compulsion to speak. It furthers the misapprehension of the interrogated. Here, Mr. Beheler preceived himself to be a citizen witness with a civic obligation to assist law-enforcement even at the cost of a family member's freedom. The officers' informing him that he was not under arrest was the functional equivalent of affirmatively communicating: "You are not in jeopardy; you need not concern yourself with your own self-incrimination." Encouraging this misapprehension brings this case under the controlling precedent of Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed.2d 694.

B. This Case Is Directly Controlled By Miranda v. Arizona, supra

Mr. Beheler does not challenge the constitutional authority of the state to introduce the statements he made to officers at his home. These statements were not the product of a stationhouse interrogation. The Miranda Court clearly explained that the compulsion to speak in the isolated setting of the police station is certainly greater than in a suspect's home where his "family and other friends are nearby, their presence lending moral support." (Miranda v. Arizona, supra, at 449.) Indeed, this Court opined that "the compulsion to

speak in the isolated setting of a police station may well be greater than in the courts." (Id., at 461; cf. United States v. Washington, supra.) "The atmosphere [of the investigator's office at the station] suggests the invincibility of the forces of the law." (Id., at 449.)

Mr. Beheler's interrogation is a model of police interrogation techniques. This further underscores the coerced nature of the confession. Detective Ray's decision to transport him from his home to the station was the first step of the process. It transformed the police activity from merely receiving a voluntary statement, to eliciting a taped confession through interrogation at the station. On this point it should be noted that the petitioner omitted a sentence from its quotation from Miranda (Petition, p. 13) which is critical in analyzing this case. The following underlined portion was omitted by petitioner.

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

Petitioner has never denied that the challenged, tape-recorded statements were the product of interrogation. The issue has been whether the interrogation was compelled.

Respondent submits that the taped portion of this confession resulted from adherence to coercive interrogation techniques described in Miranda and held to necessitate warnings. Thus, the first step is isolating the subject, preferably at the station. "[T]he 'principal psychological factor

contributing to a successful interrogation is privacy -- being alone with the person being interrogated.' (citation to police manual omitted). . . ." (Miranda v. Arizona, supra, at 450.) Certainly this was accomplished here. Nothing prevented the sheriffs from tape recording Mr. Beheler's statement while at his home, or even asking him follow-up questions on tape, there.

Secondly, the officers are instructed "from outward appearance to maintain only an interest in confirming certain details." (Id.) Mr. Beheler was informed that this would be the nature of the stationhouse questioning, and it was.

Third, "[t]he officers are instructed to minimize the moral seriousness of the offense to cast blame on the victim or on society." (Id.) The officers here encouraged Mr. Beheler's belief that his half-brother was the one responsible, morally and legally, for the crime. "The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt." (Id., at 451.) Thus, in the police manuals on interrogation, "emphasis has been placed on kindness and stratagems." (Id.)

Finally, "[t]he interrogators sometimes are instructed to induce a confession out of trickery." (Id., at 453.) "[T]he police may resort to deceptive stratagems such as giving false legal advice . . . The police then persuade, trick, or cajole him out of exercising his constitutional rights." (Id., at 455.) Certainly the subject thereafter believes he made his statements voluntarily since "the modern practice of in-custody interrogation is psychologically rather than physically oriented." (Id., at 447.)

As Miranda explained: "The entire thrust of police interrogation [in Escobedo[6/]], as in all the cases today, was

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6. Escobedo v. Illinois (1964) 378 U.S. 478, 12 L.Ed.2d 977.

to put the defendant in such an emotional state as to impair his capacity for rational judgment." (Id., at 465; emphasis added.) The police found Mr. Beheler in just such a state upon their arrival at his home. At the time they requested him to be transported to the station for more in-depth questioning, the officers knew his ability to make a free and rational choice to speak to law enforcement was impaired by his alcohol ingestion (see Townsend v. Sain, 372 U.S. 293 (1963)), by his grief-stricken emotional instability (see Spano v. New York, 360 U.S. 315 (1959)), and by his lack of knowledge regarding principles of vicarious liability and the felony-murder doctrine (see Culombe v. Connecticut, 367 U.S. 568 (1961)). It is well established that "[a]ny questioning by police officers which in fact produces a confession which is not the product of free intellect renders the confession inadmissible. (Townsend v. Sain, supra.)

It was while Mr. Beheler was grief-stricken and noticeably under the influence of alcohol that officers obtained his acquiescence to be transported to the station for interrogation. Surely this decision cannot be deemed voluntary as the product of a free will and rational intellect any more than the unknowing confession he gave at the station in response to the interrogation. When it is considered that the police affirmatively encouraged continued misunderstanding about his criminal liability, while possessing more than sufficient evidence for probable cause to arrest,[7/] there can be no doubt

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7. From the sworn testimony of the investigating officers, it is clear that Officer Lantz had been at the scene of the homicide. (RT 83.) He had interviewed witnesses at the scene. (RT 84.) He was aware of the tinfoil bindles on the ground near the body. (RT 85.) These foil bindles would raise at least a reasonable suspicion in the mind of an experienced officer that hashish was involved. Officer Lantz interviewed Mr. Beheler, both inside Mrs. Picking's house and outside. (RT 87, 98.) He discovered that Mr. Beheler had been present at the time of the shooting. (RT 88.) He also discovered that it was Mr. Beheler's car in which the suspects had driven to the liquor

(footnote continued)

that Mr. Beheler's tape-recorded responses to the station-house interrogation were compelled within the meaning of Miranda v. Arizona, supra.

Miranda specifically held that one who is brought to the station for purposes of investigation, though not under arrest, is entitled to the prophylaxis of warnings, in order to render any pre-arrest statements admissible. In one of the four Miranda cases, Vignera v. New York, No. 760, Michael Vignera was taken to the station for questioning in connection with a robbery. When the detective questioned Vignera, he orally admitted the crime. Later, while still at the station, Mr. Vignera was identified as the robber. It was only then that he was formally arrested. Thereafter, he gave a written confession to the district attorney. However, the admissibility of the pre-arrest statement was challenged. At the trial, the detective testified regarding the pre-arrest oral confession. The Miranda court reversed because "Vignera was not warned of any of his rights before the questioning by the detective and the district attorney.[8/] Thus, he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible." (Miranda v.

(footnote 7 continued)

store. (RT 89.) He already knew that the fatal shot came from inside the car. (PHT 94-95.) Blood was found on the driver's side of the car. (SCT 99.) Lantz also discovered that some of the occupants of the car had hidden the gun in Beheler's back yard. (RT 89.) Moreover, by the time of the tape recorded interrogation, the officers had the names and addresses of the other three participants. (ART 7.)

8. This case is similar to those decided with Miranda in that the challenged, tape-recorded confession was entirely unnecessary to prove Mr. Beheler's criminal liability. The officers had Mr. Beheler's volunteered confession at his home including all of the facts discussed at footnote 7, supra. In addition, the prosecution granted Mr. Chavez, a participating eye-witness to the entire incident, total transactional immunity in exchange for his testimony. As in most cases, therefore, California could have secured its conviction without violating Mr. Beheler's constitutional rights and jeopardizing its verdict.

Arizona, supra, at 494.) This Court would be compelled to distinguish or disapprove of this language in Miranda in order to overturn the opinion of the Court of Appeal in this case. The writ should be denied.

C. Granting The Writ And Overturning The Court of Appeal's Opinion Would Result in Manifest Injustice

As previously explained, the subsequently tried, direct perpetrator of this killing was convicted of voluntary manslaughter with intentional and personal use of a firearm. Yet Mr. Beheler was convicted of assisting the felony-murder Mr. Wilbanks, the perpetrator, was acquitted of committing. This unfair result was not the product of different facts, or different defenses because both men relied on diminished capacity due to voluntary intoxication (then a legal defense in California). However, this disparity resulted by operation of law in two ways.

First, in California, proof of vicarious liability for even a specific intent crime requires the state to establish only that the aider and abettor knew of the perpetrator's criminal intent, and did an act which furthered that intent. The doctrine of diminished capacity, of course, does not affect the mental state of mere knowledge, only specific intent. Since the state is not required to prove specific intent for aiding and abetting liability, the defense of diminished capacity for one so charged is no defense at all. The jury was permitted to find Mr. Beheler guilty of first degree murder even if it found he was too drunk to intend to assist in the crime, not to mention too drunk to intend to permanently deprive the drug seller of her drugs. Since a perpetrator of a robbery in California must be proved to possess the specific intent to permanently deprive the owner of property, Mr. Wilbanks' diminished capacity defense resulted in an acquittal of the robbery and attempted robbery charges.

Secondly, Mr. Beheler, as an aider and abettor, was denied delivery of instructions on lesser offenses included within first degree murder that were delivered in Mr. Wilbanks' trial. Since the theory of the state was felony-murder (a killing occurring in the perpetration of a robbery), Mr. Beheler's jury was given only the choice of guilt on first degree murder or total acquittal. (See Beck v. Alabama (1980) 447 U.S. 625.) However, Mr. Wilbanks' jury was given the instructions on mitigated intentional homicide because the killing appeared to be intentional and the diminished capacity defense was invoked.

The facts of Mr. Beheler's and Mr. Wilbanks' defenses were virtually identical, except that by all accounts Mr. Beheler was more influenced by the alcohol. Mr. Wilbanks, the actual killer, received additional benefits by operation of law. As a result, he now stands convicted of voluntary manslaughter with an eight (8) year term, while Mr. Beheler is serving a term of life without possibility of parole for aiding and abetting a first degree murder that was not committed.

Moreover, but for fate, Mr. Beheler's trial would have followed Mr. Wilbanks' trial and the prosecution would have been limited to charging voluntary manslaughter (non-mutual collateral estoppel is recognized in criminal cases in California (People v. Taylor (1974) 12 Cal.3d 686).)

Additionally, it would be unjust to grant this writ and overturn the lower court's remand for retrial in light of the fact that Mr. Beheler was the investigative tool used to solve this case and to bring in the confessions from the others. Indeed, it was Mr. Chavez, a man with two prior felony arrests who fled the police, yet who was given total transactional immunity for his testimony. Mr. Chavez was immunized for his testimony, notwithstanding the fact that he gave a complete confession on tape just as Mr. Beheler and Mr. Howard did. He

had previously been granted immunity on at least one other felony charge.

Finally, securing Mr. Beheler's conviction of murder and sentence of life imprisonment without possibility of parole, as an aider and abettor to a crime in which the actual killer will serve a maximum term of eight (8) years, violates fundamental notions of proportionate punishment inherent in the Eighth Amendment to the United States Constitution. (Enmund v. Florida (1982) ___ U.S. ___, 73 L.Ed.2d 1140.) Granting this writ and overturning the unpublished opinion of the Court of Appeal would serve only to defeat the ends of justice.

The petition for writ of certiorari should be denied.

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CONCLUSION

This is the wrong case in which to decide the question presented. The facts of this case raise many more facets of custodial interrogation than petitioner would suggest. Resolution of these permutations could absorb substantial judicial resources. And yet underlying each such analysis would remain the uniquely limiting facts of a passive aider and abettor with no awareness of his own potential criminal liability and absolutely no experience with or education in the criminal justice system.

In light of the fact that this unpublished case possesses absolutely no precedential utility to the defense; and in light of the vastly disproportionate punishments imposed on the aider and abettor compared with the perpetrator; and finally, in light of Mr. Beheler's personal efforts to carry out his civic duty as he perceived it following the crime; the only just holding would be to deny the writ, and permit Mr. Beheler to stand retrial to face the charges for which the actual killer was convicted. California has never contended that without the challenged confession it would lack the evidence to confict. Nor could it. This confession was unnecessary to its case. The petition for writ of certiorari should be denied.

DATED: May 23, 1983

Respectfully submitted,

QUIN DENVIR
State Public Defender

JULIA CLINE NEWCOMB
Deputy State Public Defender

Attorneys for Respondent

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

JULIA CLINE NEWCOMB, being first duly sworn, deposes and says:

That affiant is a citizen of the United States, over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 1107 Ninth Street, Third Floor, Sacramento, California, 95814; that on the 23rd day of May, 1983, affiant, pursuant to rule 28.3 of Rules of the United States Supreme Court, enclosed a true copy of the within RESPONDENT'S BRIEF IN OPPOSITION in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed:

Hon. Kevin A. Swanson, Clerk
California Court of Appeal
Fifth Appellate District
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Fresno, California 93721

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JULIA CLINE NEWCOMB

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 1983.

NOTARY PUBLIC FOR CALIFORNIA